Supreme Court, U.S.
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No. 95-57

In the Supreme Court of the United States

OCTOBER TERM, 1995

NORMAN A. GERMINO, PETITIONER

v.

DEPARTMENT OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Merit Systems Protection Board correctly concluded that the National Security Agency complied with applicable procedural safeguards when it removed petitioner from employment because of the revocation of his required security clearance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the decision is noted at 52 F.3d 345 (Table). The decision of the Merit Systems Protection Board (Pet. App. 9a-32a) is reported at 61 M.S.P.R. 683. The decision of the administrative judge (Pet. App. 33a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1995. The petition for a writ of certiorari was filed on July 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Security Agency (NSA or agency) is an intelligence agency separately organized within the Department of Defense. The agency was established by Presidential Directive in October, 1952, and is responsible for conducting communications and signals intelligence activities and for providing security for United States government communications.

Congress has mandated that no person shall be employed by the agency or granted access to classified information, unless such employment or access is "clearly consistent with the national security." 50 U.S.C. 831. All NSA employees must, as a condition of NSA employment, be cleared for access to Sensitive Compartmented Information (SCI).[1] The criteria for SCI access have been established by the Director of Central Intelligence (DCI) pursuant to the National Security Act of 1947, 50 U.S.C. 403, and Executive Order No. 12,356, 3 C.F.R. 166 (1982 comp.).[2] See Director of Central Intelligence Direc-

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[1] SCI is not a statutory term, but instead describes a special access program developed by the Director of Central Intelligence. Congress recognized that NSA's mission involves highly sensitive cryptologic information (see 50 U.S.C. 832), and so it subjected that cryptologic information to restricted access programs designated by Executive Branch intelligence experts, including the Director of Central Intelligence (50 U.S.C. 834). Accordingly, the statute requires that all employees of NSA be eligible for access to classified information that, because of its sensitivity, is subject to restricted access programs. *Ibid.*

[2] On October 15, 1995, Executive Order No. 12,958 will supersede Executive Order No. 12,356. See 60 Fed. Reg. 19,825, 19,843 (1995). Section 4.4 of Executive Order No. 12,958

tive No. 1/14 (Nov. 1987), Pet. C.A. Br. App. A43-A61 (DCI Directive).[3]

If questions are raised concerning an employee's suitability for continued access to classified information, the NSA Director or his designate must apply established criteria to evaluate the individual's clearance status. An employee whose access to SCI is revoked may be afforded an opportunity for appeal within the agency if the clearance authority determines that such appeal would be "clearly consistent with the interests of the national security." DCI Directive Annex B, Pet. C.A. Br. App. A57.

Because all NSA positions require access to SCI, NSA employees who lose their clearance for access to SCI must be removed from their positions. See 50 U.S.C. 832. Although the National Security Agency Act of 1959, Pub. L. No. 86-36, 73 Stat. 63, exempts NSA employees from the civil service laws (see § 2, 73 Stat. 63), NSA employees faced with removal from their positions are afforded certain procedural protections. Under the authority of Public Law No. 86-36, as delegated by the Secretary of Defense, the Director of NSA has promulgated regulations governing personnel matters. National Security Agency/Central Security Service Personnel Management Manual (NSA/CSSPMM) 30-2. Chapter 370 of those regulations sets forth the general standards and procedures for removing an

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continues the authority of the DCI to establish special access programs pertaining to intelligence sources and methods. 60 Fed. Reg. 19,837 (1995).

[3] "Pet. C.A. Br. App." refers to the appendix to the brief filed by petitioner in the court of appeals. "C.A. Jt. App." refers to the joint appendix filed in the court of appeals.

employee for cause. The regulations require that the employee be provided with notice of the proposed removal, including a statement outlining the specific charge; the opportunity to respond to the charge (including the right to representation by an attorney or other individual); and a written final decision outlining the reasons for the action if the employee is removed. NSA/CSSPMM 30-2, ch. 370, §§ 4-7, 4-8, Pet. C.A. Br. App. A66-A68.[4]

Preference-eligible veterans, such as petitioner, who are employed by NSA are also entitled to appeal adverse NSA personnel actions to the Merit Systems Protection Board (MSPB). NSA/CSSPMM 30-2, ch. 370, § 4-10.a, Pet. C.A. Br. App. A69; see 5 U.S.C. 7511(a)(1)(B), 7512, 7701(a). Final decisions of the MSPB are subject to review by the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(b)(1).

2. Petitioner was removed from employment as a language analyst at NSA following the agency's revocation of his clearance for access to SCI. The revocation of the clearance was based on petitioner's "unauthorized removal and subsequent storage of classified information in unsecured spaces, * * * disclosure of classified information to unauthorized persons, and * * * disclosure, to unauthorized persons, of the identities of several intelligence officers in sensitive assignments." Pet. App. 2a-3a; see C.A. Jt. App. 845. Before removing petitioner, NSA provided him with written notice of his proposed removal, and attached supporting investigative memoranda informing him of the specific reasons why his

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[4] Section 4, the pertinent section of Chapter 370, is reproduced at Pet. C.A. Br. App. A64-A69.

clearance had been revoked. Pet. App. 17a; see C.A. Jt. App. 829-830, 832-834, 842-846. The notice, which was dated March 19, 1991, afforded petitioner an opportunity to respond to both the clearance decision and the proposed removal. *Id.* at 829. Petitioner submitted a written response to the agency on November 21, 1991, and a hearing was held before Donald L. Parsons, the Chief of Staff of NSA, on December 3, 1991. On December 16, 1991, Parsons issued a final decision affirming the revocation of petitioner's clearance and sustaining petitioner's removal from employment at NSA. *Id.* at 724-729.

3. Petitioner appealed the agency's decision to the MSPB. On June 19, 1992, an administrative judge rendered the initial decision of the MSPB, sustaining the agency's action. Pet. App. 33a-49a. The administrative judge noted that the MSPB "is without authority to review the merits of the agency's revocation of the security clearance," *id.* at 34a (citing *Department of Navy* v. *Egan*, 484 U.S. 518 (1988)), and that the MSPB's inquiry is limited to determining whether petitioner received the appropriate procedural protections governing his removal from employment, and whether he received "minimal due process protection" surrounding the revocation of his clearance. Pet. App. 34a-35a. The administrative judge found that a security clearance was a requirement of petitioner's employment at NSA, that petitioner's clearance was revoked, and that the agency had complied with the procedural requirements of 5 U.S.C. 7513 (which governs termination for cause from government employment) and its own regulations in removing petitioner. Pet. App. 37a-43a. The administrative judge also found that, with respect to the revocation of his clearance, petitioner was

afforded basic due process, including notice of the action against him, a statement of reasons, and an opportunity to respond. *Id.* at 43a-49a.

The MSPB sustained the decision of the administrative judge. Pet. App. 9a-32a. The MSPB concluded that petitioner was afforded due process with respect to the revocation of his clearance, as the agency informed him of the basis for his clearance revocation and gave him the opportunity to respond to the clearance determination and the proposed removal. *Id.* at 17a. The MSPB also concluded that the agency had "afforded [petitioner] his due process rights under 5 U.S.C. § 7513" with respect to his removal. *Id.* at 19a. The MSPB ruled further that petitioner had not shown any prejudicial error from any alleged violation of agency regulations surrounding his removal, *id.* at 19a-23a, and it noted that the NSA regulations do not apply to the agency's decision to revoke petitioner's clearance, as distinguished from the removal action, *id.* at 22a.[5]

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-7a. The court ruled that NSA had complied with Section 7513 with respect to petitioner's removal by providing petitioner with

> advance written notice of 1) the proposed removal, 2) the fact that the removal action was the result of the agency's denial of his security clearance, and 3) the specific offenses which resulted in his clearance being denied * * * [as well as] eight months to respond, an opportunity to be repre-

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[5] One member of the MSPB dissented in part, and would have held that the MSPB could not consider the constitutional adequacy of the procedures used in the revocation of petitioner's clearance. Pet. App. 28a-32a.

> sented by an attorney or other representative, and a written decision enumerating the reasons for his removal.

Id. at 5a-6a. The court further held that any redaction of classified information by NSA from the documentation provided to petitioner was authorized by Section 6 of Public Law No. 86-36, 73 Stat. 64,[6] and did not violate any procedures to which petitioner was entitled. Pet. App. 6a-7a. In addition, the court found petitioner's contention that NSA violated its own regulations to be "without merit." *Id.* at 7a.

ARGUMENT

1. Petitioner contends (Pet. 16-17) that the court of appeals erred in affirming the MSPB's conclusion that NSA afforded him the process due under 5 U.S.C. 7513 when it terminated his employment. That fact-specific contention is incorrect. There is ample evidence in the record that NSA met the requirements of Section 7513, which entitled petitioner to the following procedural protections in his removal action:

> (1) at least 30 days' advance written notice * * * stating the specific reasons for the proposed action;
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

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[6] Section 6 of Public Law No. 86-36 protects from disclosure information with respect to the activities of NSA, and the names, titles, salaries, and number of persons employed by NSA.

> (3) [the right to representation] by an attorney or other representative; and
>
> (4) a written decision and the specific reasons therefor at the earliest practicable date.

5 U.S.C. 7513(b).

NSA provided petitioner with more than the 30 days' notice required under Section 7513(b)(1). By letter dated March 19, 1991, ten months prior to petitioner's removal, the agency notified petitioner that he had "been found to be ineligible for continued access to classified information and thereby fail[ed] to meet a mandatory condition of employment." C.A. Jt. App. 829-830. The letter specified the reasons for petitioner's ineligibility, noting his involvement in "1) the unauthorized removal and subsequent storage of classified documents in unsecured spaces; 2) the divulgence of classified information to unauthorized individuals; and 3) the disclosure of the identities of several intelligence officers in sensitive assignments." *Id.* at 829. Attached to the letter were memoranda detailing the support for these reasons. See *id.* at 832-834, 842-846. Indeed, petitioner acknowledged his security violations. *Id.* at 727, 728, 729; Pet. App. 3a.[7]

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[7] Although petitioner now denies that he acknowledged committing the security infractions, Pet. 18 n.8, petitioner admitted in his hearing before the administrative judge that he "let information get out of secure channels." C.A. Jt. App. 1431. The court of appeals agreed that the record demonstrated his acknowledgement. Pet. App. 3a. That factual dispute is not one that this Court should resolve. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In addition, the question whether petitioner committed the underlying infractions pertains to the merits of the security clearance decision

The agency also met and exceeded the "reasonable time" requirement of Section 7513(b)(2), as NSA provided petitioner with eight months to prepare his response—far more than the required seven days. Petitioner was represented by counsel throughout the proceeding, as authorized by Section 7513(b)(3). See Pet. 4-5. Finally, NSA complied with Section 7513(b)(4) by providing petitioner with a written decision, discussing his security violations in depth. See C.A. Jt. App. 724-725, 727-729. Accordingly, the MSPB properly concluded that NSA had complied with Section 7513, and the court of appeals correctly affirmed.

2. Petitioner also contends that NSA violated its own regulations in removing him from employment, and that the MSPB failed to address his argument on that ground. See Pet. 32-41. The contention that the MSPB did not consider the argument is clearly incorrect, as the MSPB engaged in a detailed analysis of the issue. See Pet. App. 19a-23a. After discussing the NSA's regulations and petitioner's allegations of noncompliance, the MSPB found that petitioner had failed to demonstrate any harmful error in any of the agency's actions that were alleged to violate the regulations. *Id.* at 21a-23a.

Petitioner argues specifically that NSA violated Sections 4-6.a, b, and c of its regulations, which require 30 days' advance written notice of the proposed action with a statement of specific reasons, and an opportunity to reply. Those requirements, however, merely duplicate the requirements of Section 7513, which NSA met, as discussed above, pp. 7-8, *supra*.

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and is not subject to review by the MSPB or the courts. See *Department of Navy* v. *Egan*, 484 U.S. 518, 529-532 (1988).

Petitioner also asserts that NSA violated Section 4-7.b(2) of its regulations, which states that "[i]nformation which may not be disclosed to the employee or his or her representative or designated physician may not be used to support the reasons in the notice [of proposed personnel action]." Pet. C.A. Br. App. A67; see Pet. 55. Petitioner contends that NSA violated that regulation by redacting classified information from the supporting memoranda attached to the March 19, 1991, notice, while allowing the deciding official to see the unredacted memoranda. See Pet. 55-56; C.A. Jt. App. 832-834, 842-846, 905-909. That contention is incorrect.

NSA made two, separate decisions about petitioner: First, it revoked his clearance for access to SCI; second, it terminated his employment because he no longer had the requisite clearance. See *Jamil* v. *Secretary, Dep't of Defense*, 910 F.2d 1203, 1208 (4th Cir. 1990) (distinguishing between the two decisions). As the MSPB held (Pet. App. 22a), Section 4 of the NSA regulations applies only to the agency's removal decision, and not to the clearance determination. See NSA/CSSPMM 30-2, ch. 370, § 4-1.a, Pet. C.A. Br. App. A64 (Section 4 covers suspensions, enforced leave, pay and grade reductions, removals, separations for disability, and furloughs). The redacted memoranda state the reasons for the revocation of petitioner's clearance, not the reason for the termination of petitioner's employment.

Even if the redacted information was considered by the agency with regard to its decision to revoke petitioner's clearance, that use was governed, not by the NSA regulation cited by petitioner, but by DCI Directive No. 1/14. Under that Directive, when "clearly consistent with the interests of the national

security," the employee is entitled to notification of the revocation of his SCI access, the reasons for the revocation, and an opportunity to appeal to an agency official. See Pet. C.A. Br. App. A43, A57-A58. The procedures contain no requirement similar to that found in Section 4-7.b(2), the NSA regulation cited by petitioner.

Petitioner does not contend that he was denied the process due him under DCI Directive No. 1/14. He received notification of the clearance revocation decision, along with detailed information as to the reasons for the revocation. C.A. Jt. App. 829-830, 832-834, 842-846. In addition to the redacted memoranda, NSA furnished petitioner with other materials to assist in the preparation of a response, including a list of the classified documents found in petitioner's home. See *id.* at 643-649.

Finally, petitioner contends that NSA violated Sections 4-5.b and 4-7.d of its regulations. See Pet. 25-26, 61 n.36. Under Section 4-5.b, "the Deputy Director for Administration (DDA) shall dispose the [personnel] action," Pet. C.A. Br. App. A65, and under Section 4-7.d(1), "[t]he deciding official may not delegate the hearing of the [employee's] oral reply," Pet. C.A. Br. App. A67. Petitioner's argument appears to be based on the mistaken notion that the Deputy Director must personally decide each personnel action. As the MSPB correctly found, "[t]here is nothing in the regulation that prohibits delegation of the DDA's deciding authority." Pet. App. 21a. The language in Section 4-7.d prohibiting the deciding official from delegating the hearing of the oral reply means simply that the person who decides a case must also hear the oral reply. In petitioner's case, the DDA recused himself (see C.A. Jt. App. 827), and

the DDA's superior, the Chief of Staff, became the deciding official and also personally heard petitioner's oral reply, in accordance with NSA regulations. See Pet. App. 40a-41a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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